

FCC MAIL SECTION

Federal Communications Commission

FCC 98-252

Oct 21

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matters of )  
)  
**NORCOM COMMUNICATIONS** ) WTB DOCKET NO. 98-181  
**CORPORATION** )  
)  
Business Radio Station License WNQF836 )  
SMR Radio Stations WZA770, WNBW505, )  
WNAJ380, WNRU218 and WNJU965 )  
New York, New York/Long Island Area )  
)  
Application to Modify Business ) File Number A008053  
Radio Station License WNQF836 )  
New York, New York/Long Island Area )  
)  
Application to Modify SMR ) File Number C002479  
Radio Station License WZA770 )  
New York, New York/Long Island Area )  
)  
Application to Modify SMR ) File Number C002480  
Radio Station License WNBW505 )  
New York, New York/Long Island Area )  
)  
**ASSOCIATION FOR EAST END** )  
**LAND MOBILE COVERAGE** )  
Business Radio Station License WPAT918 )  
New York, New York/Long Island Area )  
)  
**LMR 900 ASSOCIATION OF SUFFOLK** )  
Business Radio Station License WNXT323 )  
New York, New York/Long Island Area )  
)  
**METRO NY LMR ASSOCIATION** )  
Business Radio Station License WPAZ643 )  
New York, New York Area )  
)  
**NY LMR ASSOCIATION** )  
Business Radio Station License WPAP734 )  
New York, New York/Long Island Area )

WIRELESS COMMUNICATIONS )  
ASSOCIATION OF SUFFOLK COUNTY )  
Business Radio Station License WPAT910 )  
New York, New York/Long Island Area )

**ORDER TO SHOW CAUSE, HEARING DESIGNATION ORDER AND  
NOTICE OF OPPORTUNITY FOR HEARING FOR FORFEITURE**

**Adopted: September 30, 1998**

**Released: October 14, 1998**

By the Commission:

**Introduction**

1. The Commission has before it: (a) Specialized Mobile Relay System (SMR) Stations WZA770, WNBW505, WNAJ380, WNRU218, and WNJU965 and Business Radio Station WNQF836, licensed to Norcom Communications Corporation ("Norcom"); (b) Norcom's application to modify its license for Business Radio Station WNQF836; (c) Norcom's application to modify its license for SMR Radio Station WZA770; (d) Norcom's application to modify its license for SMR Radio Station WNBW505; (e) Business Radio Station WPAT918, licensed to the Association for East End Land Mobile Coverage ("East End"); (f) Business Radio Station WNXT323, licensed to the LMR 900 Association of Suffolk ("LMR 900"); (g) Business Radio Station WPAZ643, licensed to the Metro NY LMR Association ("Metro"); (h) Business Radio Station WPAP734, licensed to the NY LMR Association ("NY"); (i) Business Radio Station WPAT910, licensed to the Wireless Communications Association of Suffolk County ("Suffolk"); and (j) the results of an investigation into apparent violations by these licensees of the Commission's Rules and of the Communications Act of 1934, as amended ("The Act"), by the Wireless Telecommunications Bureau ("Bureau") staff. As discussed below, the information before us raises substantial and material questions of fact as to whether East End, LMR 900, Metro, NY, and Suffolk (hereinafter collectively referred to as the "Associations") and/or Norcom are qualified to be and remain Commission licensees.<sup>1</sup>

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<sup>1</sup> In addition to the captioned applications, there are twenty other applications by Norcom pending before the Commission. These are: an application (File No. D105902) for consent to the assignment to Norcom of Business Radio (GB) Station WNIA633 from Industrial Mets, Inc., and for modification of the license for

**Background**

2. The Bureau staff commenced its investigation in May 1996 after receiving a **complaint** alleging that Norcom was illegally operating non-profit Business Radio Station WPAT910, licensed to Suffolk, to provide a for-profit, commercial service. The investigation subsequently came to include the other referenced Associations when questions arose as to the legitimacy of Norcom's business relationship with the other Associations.

3. Norcom's captioned SMR systems are authorized to provide commercial communications service. The Associations' stations are licensed as Private Mobile Radio Service (PMRS) operators of trunked, shared-use Business Radio stations on frequencies above 800 MHz. Section 90.179(f) of the Commission's Rules, 47 C.F.R. § 90.179(f), prohibits such stations from being used to provide for-profit, commercial service. The Associations, therefore, are required to provide shared service on a non-profit basis.

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Business Radio Station WNJU965 to include, inter alia, the authority now assigned to Station WNIA633; two applications (File Nos. C000492 and C000493) for new trunked Industrial/Business (YG) licenses; seven applications (File Nos. A026134 through A026139 and A026196) for new conventional Industrial/Business (IG) licenses; applications (No File Nos.) for consent to the assignment to Norcom of the licenses for Business Radio Stations WNSS850 (GU) from Long Island SMR Group, Inc., WPLQ879 (IB) from Atlantic Telecom, WPLQ876 (IB) from Atlantic Telecom, WIK602 (IB) from Allen & Company, Inc., WIK403 (IB) from Mobile Trends Automotive, Inc., WIL387 (IB) from All Quality HPE, Inc., and WII723 (IB) from Jerry Spiegel Associates; applications (File Nos. D111211 through D111214) for consent to the assignment to Norcom of the licenses for Business Radio Stations (IB) KNAO783 from Conti, Kraus & Martin Auto Body, Inc., WNBD235 from Tower Landscaping, Inc., WIF409 from A Legrow Roofing, Inc., and WII678 from A-1 Sewer & Drain Service, Inc.; applications (File Nos. D110635, D110636, and D110638) for consent to the assignment to Norcom of Business Radio Stations (IB) WIK617 from American Industrial Doors, Inc., WIG816 from Pyramid Air Conditioning, and WIF332 from International Shoppes, Inc., and for modification of those licenses; and an application (File No. D099348) for consent to the assignment of the following Business Station licenses to Norcom from the entity so indicated and for modification of all of the following authorizations under one call sign: WII671, from FDA Fuel Oil Service Corporation; WIL871, from International Investigative Group; WIL212, from Medallion Oil Company, Inc.; WIK741, from All Seasons Air Conditioning; WNBD212, from Intercounty Building Materials Corporation; WNAM344, from Nassau Regional Off-Track Betting Corporation; KNR665 from Sun Carting, Inc.; WIM823, from EPC Alamar Carting Corporation; WIK771, from Syncor International Corporation; WII587, from Twin County Swimming Pool Service, Inc.; WIG689, from Dimensions II Associates; WIG590, from East Nor Sanitary Services, Inc.; WBG957, from World Sanitation Corporation; WIL367, from L&M Specialty Company; KNBC454, from Lawn N Turf, Inc.; WIL327, from Advanced Air Conditioning, Heat & Refrigeration, Inc.; WIL217, from All Weather Temperature Control, Inc.; WIJ430, from European American Waste Disposal Corporation; WIH307, from J&M Auto Body Corporation; WIJ927, from Perfection Landscaping, Inc.; WIL814, from North Central Electric Co., Inc.; KNA431, from Expressway Auto Glass, Inc.; WIK360, from S&S Auto Sales & Service, Inc.; WIE569, from Merrick Master Locksmith, Inc.; KB6474, KNS913, and WID881 from Grand Carting, Inc.; WIE788, from Prices Radio & Electronics, Inc.; WII783, from Kaffco Foreign Car Parts, Ltd.; and WII722, from A. D'Angelo Glass & Mirror, Inc. The Commission will withhold action on these applications pending the outcome of this proceeding.

4. It appears from the Bureau's investigation that Norcom played a significant role in the formation of the Associations and in the subsequent acquisition of their licenses and operation of their stations. According to the information before us, the Associations were formed in 1990, apparently with the direct assistance of Robert Nopper ("Nopper"), then a principal of Norcom.<sup>2</sup> It further appears that Nopper helped conduct research and helped draft the documents necessary to create the Associations. Norcom apparently paid start-up expenses of the Associations, including legal fees. The bylaws of all of the Associations contain essentially the same terms and conditions. The bylaws state that each Association shall be controlled by a three-member board of directors. According to the bylaws, the Associations have "no members as such" and their directors are not required to be users.

5. At the time the Associations were organized, there were apparently no frequencies available for commercial communications service in the geographical areas proposed to be served; however, there were frequencies available for non-profit service. After the Associations were formed, Nopper apparently assisted at least four of the five Associations in preparing their respective FCC applications for the captioned non-profit licenses. The applications filed by East End, Metro, NY and Suffolk were considered by the Commission at the same time. A fifth application, filed by LMR 900, was considered separately. Each Association's license specifies Norcom's address as its mailing address.

6. The investigation further reveals that each of the Associations has apparently entered into a long term (10 years, with an option for an additional 10 years) written contract that permits Norcom to manage each captioned Business Radio station. The contracts apparently place all financial risks upon Norcom and place no limit on the fees Norcom may charge to users. Pursuant to the contracts, Norcom apparently provides all of the equipment and services for the Associations' stations, pays all expenses, receives all revenues for at least five years, recruits new users, and promotes and maintains the systems. All of the Associations apparently accepted Norcom's contractual terms without entertaining bids from other providers or seeking more favorable terms from competitors of Norcom.

7. The Bureau's investigation also reveals that Norcom apparently has entered into agreements with intermediaries allowing the intermediaries to resell air time over the Associations' Business Radio stations on a for-profit basis. The resale agreements are devoid of any reference to the Associations, and they do not indicate that service will be provided by stations authorized to provide only non-profit service. The agreements refer to Norcom as the "owner" of trunked land mobile repeater systems.

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<sup>2</sup> Douglas J. Nopper became the controlling principal of Norcom on July 31, 1997.

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**Discussion**

8. Section 310(d) of the Act, 47 U.S.C. § 310(d), prohibits the transfer of control of a radio station without the Commission's approval. Section 310 prohibits de facto as well as de jure transfers of control.<sup>3</sup> In determining whether de facto control of a non-broadcast license or facility has been transferred in violation of Section 310(d), the Commission and the courts have relied upon a six prong test originally announced in Intermountain Microwave, 24 RR 983 (1963). The six indicia of de facto control<sup>4</sup> are:

- (a) Does the licensee have unfettered use of all facilities and equipment?
- (b) Who controls daily operations?
- (c) Who determines and carries out policy decisions, including preparing and filing applications with the Commission?
- (d) Who is in charge of employment, supervision and dismissal of personnel?
- (e) Who is in charge of the payment of financial obligations, including expenses arising out of operating?
- (f) Who receives the monies and profits from the operation of the facilities?

The Commission has held that the touchstone of the Intermountain test is actual control.<sup>5</sup>

9. When the Intermountain factors are applied to the business relationship between Norcom and each Association, a substantial and material question exists as to whether Norcom and the Associations have engaged in unauthorized transfers of control of each of the Associations' licenses, in violation of Section 310(d) of the Act. Norcom appears to have played a substantial role in organizing each Association at a time when for-profit spectrum was unavailable. Furthermore, the management agreements appear to give Norcom unfettered control over the construction, daily operation, maintenance, management and marketing of the Associations' stations, as well as the personnel who perform these functions. The management agreements also appear to give Norcom substantial, if not complete, financial control over the

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<sup>3</sup> See Lorain Journal Co. v. FCC, 351 F.2d 824, 828 (D.C. Cir. 1965), cert. denied, 383 U.S. 967, 86 S.Ct. 1272 (1966).

<sup>4</sup> See also Telephone and Data Systems, Inc. v. FCC, 19 F.3d 42 (1994); and LaStar Cellular Telephone Co., 5 FCC Rcd 3286 (1990).

<sup>5</sup> See, e.g., News International PLC, 97 FCC 2d 349, 355-56 (1984).

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**Associations.**

10. In addition there is a substantial and material question as to whether Norcom and/or the Associations are using stations WPAT918, WNXT323, WPAZ643, WPAP734, and/or WPAT910 to provide for-profit private carrier service in violation of Section 90.179(f) of the Commission's Rules, 47 C.F.R. § 90.179(f). The resale agreements between Norcom and intermediaries describe an arrangement in which commercial service is apparently being sold to customers on a for-profit basis. In this regard, the Commission has recognized that there is a danger that commercial management companies might set up not-for-profit entities to apply for and obtain licenses for non-profit, shared-use stations and subsequently offer for-profit commercial service under the guise of management agreements. Indeed, the Commission has warned:

Although we conclude that the hiring of a manager by multiple licensees does not fall within the definition of "for-profit" service, we intend to monitor closely the use of multiple-licensing arrangements to ensure that unlicensed managers do not attempt to provide for-profit service as de facto licensees. Our rules clearly state that the ultimate responsibility for operation of the system resides with the licensee and cannot be assumed by an unlicensed third party. Thus, a not-for-profit system structured to give an unlicensed manager sufficient operational control to provide for-profit service to customers would be a violation of Section 310(d) of the Communications Act and our rules, for which the system license could be revoked.<sup>6</sup>

11. The use of a sham not-for-profit association to provide for-profit, commercial service to customers threatens the integrity of the Commission's regulatory scheme for land mobile stations and harms legitimate not-for-profit licensees and SMR operators. Furthermore, to the extent non-bona fide "not-for-profit" associations use frequencies allocated to not-for-profit frequencies, legitimate not-for-profit licensees are unable to use those frequencies. Legitimate SMR operators are harmed by sham associations because the use of frequencies reserved for not-for-profit operation gives the sham associations an unfair competitive advantage.

12. Furthermore, there is a substantial and material question as to whether Norcom has abused the Commission's processes. "As we have stated in the past, 'it is an abuse of process to specify a surrogate to apply for a station so as to deny the Commission and the public the

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<sup>6</sup> Second Report and Order, Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services, 9 FCC Rcd 1411, 1430-31, (1994). See also Viking Dispatch Services, Inc., 11 FCC Rcd 6685 (WTB 1996).

opportunity to review and pass on the qualifications of that party."<sup>7</sup> Norcom was not eligible to acquire, in its own name, Business Radio Station licenses in the 800-900 MHz band with the intent of using those licenses solely to offer service to others. In this case, it appears that Norcom has set up and controlled the Associations for the purpose of acquiring such licenses. That purpose is specifically prohibited by our rules and policies. The Commission has generally defined abuse of process as misconduct "which threatens the integrity of the Commission's licensing processes. . ."<sup>8</sup> We believe that Norcom's alleged behavior would, if proven, constitute a serious threat to our licensing processes.

### **Ordering Clauses**

13. Accordingly, IT IS ORDERED THAT, pursuant to Sections 309(e), 312(a)(2), 312(a)(4), and 312(c) of the Act, 47 U.S.C. §§ 309(e), 312(a)(2), 312(a)(4), and 312(c) and Section 1.227 of the Commission's Rules, 47 C.F.R. § 1.227, Norcom's above-captioned applications are designated for hearing and Norcom, East End, LMR 900, Metro, NY and Suffolk are directed to show cause why their respective above-captioned licenses should not be revoked, in a consolidated proceeding, upon the following issues:

- (a) To determine whether Norcom, East End, LMR 900, Metro, NY and/or Suffolk violated Section 310(d) of the Act by engaging in unauthorized transfers of control of Stations WPAT918, WNXT323, WPAZ643, WPAP734, and/or WPAT910;
- (b) To determine whether Norcom, East End, LMR 900, Metro, NY and/or Suffolk violated Section 90.179(f) of the Commission's Rules, 47 C.F.R. § 90.179(f), by operating Stations WPAT918, WNXT323, WPAZ643, WPAP734, and/or WPAT910 on a for-profit basis;
- (c) To determine whether Norcom has abused the Commission's processes in connection with the creation and/or control of the Associations and/or with the control and/or operation of the Associations' stations;
- (d) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Norcom, East End, LMR 900, Metro, NY and/or Suffolk are basically qualified to be Commission licensees;

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<sup>7</sup> Trinity Broadcasting of Florida, Inc., 8 FCC Rcd 2475, 2481 (1993), quoting Arnold L. Chase, 5 FCC Rcd 1642, 1643 (1990).

<sup>8</sup> Policy Statement on Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, 1211 (1986).

(e) To determine, in light of the evidence adduced pursuant to issues (a)-(d), whether the above-captioned licenses should be revoked; and

(f) To determine, in light of the evidence adduced pursuant to issues (a)-(d), whether the above-captioned applications should be granted.

14. IT IS FURTHER ORDERED that irrespective of the resolution of the foregoing issues, it shall also be determined, pursuant to Section 503(b)(3)(A) of the Act, 47 U.S.C. § 503(b)(3)(A), whether an Order of Forfeiture shall be issued against each of the parties for having (a) willfully or repeatedly violated § 310(d) of the Act and (b) having willfully or repeatedly violated Section 90.179(f) of the Commission's Rules. For the violation of Section 310(d) of the Act, the maximum potential forfeiture liability for each of the Associations shall be \$25,000, and the maximum potential forfeiture liability for Norcom shall be \$125,000. For the violation of Section 90.179(f) of the Commission's Rules, the maximum potential forfeiture liability for each of the Associations shall be \$12,000, and the maximum potential forfeiture liability for Norcom shall be \$60,000. Those figures are set based upon the seriousness of the alleged violations, the continuing nature of the alleged violations, the apparent culpability of the parties, the information available to us concerning the financial condition of the Associations, Norcom's ability to profit from the alleged rule violations, and the nature of the stations in question.

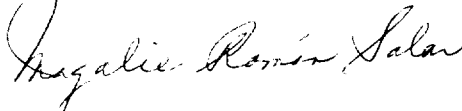
15. IT IS FURTHER ORDERED that, in connection with the potential forfeiture liability noted above, this document constitutes notice, pursuant to Section 503(b)(3)(A) of the Act.

16. IT IS FURTHER ORDERED that, to avail themselves of the right, under Section 1.91(c) of the Commission's Rules, 47 C.F.R. § 1.91(c), to present evidence at a hearing in these proceedings, the respondents shall each file a request for a hearing within 30 days after receiving this Order.

17. IT IS FURTHER ORDERED that, under Section 312(d) of the Act, 47 U.S.C. § 312(d), both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Wireless Telecommunications Bureau as to the issues at paragraph 12(a)-(e) and upon Norcom as to the issue at paragraph 12(f).



18. IT IS FURTHER ORDERED that copies of this Order shall be sent by Certified Mail -- Return Receipt Requested, to Norcom's counsel, Russell H. Fox, Esq., Gardner, Carton & Douglas, 1301 K Street, N.W., Suite 900, East Tower, Washington, D.C. 20005, and to the Associations' counsel, George Petrutsas, Esq., Fletcher, Heald & Hildreth, 11th Floor, 1300 North 17th Street, Rosslyn, Virginia 22209-3801.

**FEDERAL COMMUNICATIONS COMMISSION**

Magalie Roman Salas  
Secretary